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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

In re:

PG&E CORPORATION

- and -

PACIFIC GAS AND ELECTRIC
COMPANY,

Debtors.

- | | |
|-------------------------------------|---|
| <input type="checkbox"/> | Affects PG&E Corporation |
| <input type="checkbox"/> | Affects Pacific Gas and
Electric Company |
| <input checked="" type="checkbox"/> | Affects both Debtors |

Bankruptcy Case
No. 19-30088 (DM)

Chapter 11

(Lead Case)

(Jointly Administered)

Date: June 26, 2019
Time: 9:30 a.m.
Ctrm: 17
Judge: Dennis Montali

**OBJECTION OF THE CALIFORNIA STATE AGENCIES TO MOTION OF
DEBTORS FOR ENTRY OF PROTECTIVE ORDER PURSUANT TO
FED. R. BANKR. P. 7026 AND 9014(c) AND 11 U.S.C. § 105(a) GOVERNING
DISCOVERY MATERIALS AND OTHER INFORMATION [DOCKET NO. 2459]**

1 The California Department of Toxic Substances Control, California Department of Water
2 Resources, State Water Resources Control Board, Regional Water Quality Control Boards, State
3 Energy Resources Conservation and Development Commission, California Department of
4 Forestry and Fire Protection, California Department of Fish and Wildlife, California Air
5 Resources Board, California Franchise Tax Board, California Coastal Commission, Department
6 of Parks and Recreation, San Francisco Bay Conservation and Development Commission,
7 Department of Housing and Community Development, Central Valley Flood Protection Board,
8 Department of Conservation including the Division of Oil, Gas, and Geothermal Resources, State
9 Coastal Conservancy, California High Speed Rail Authority, California Natural Resources
10 Agency, and California State Lands Commission (collectively, the “California State Agencies”)
11 hereby file this objection to the Debtors’ motion for entry of a protective order governing
12 discovery materials and other information in the above-captioned jointly administered Chapter 11
13 cases (“Chapter 11 Cases”) (the “Motion”) [Docket No. 2459] based on the following:

14 INTRODUCTION

15 1. The Debtors and the TCC¹ have filed competing motions for the entry of a
16 protective order that would apply to any person or entity, which includes governmental units
17 under Bankruptcy Code section 101(15), for all matters in these Chapter 11 Cases,
18 notwithstanding the fact that the Proposed Protective Orders were negotiated solely between the
19 Debtors, the TCC and the UCC. Both motions are set for hearing on June 26. The California
20 State Agencies have no objection if the Proposed Protective Order applies only to the parties that
21 negotiated it, namely the Debtors, the TCC and the UCC. However, the California State
22 Agencies object to having the Proposed Protective Order apply to governmental units, including
23 but not limited to governmental units of the State of California. The California State Agencies
24 are informed and believe that other governmental entities have a similar objection, including the
25 United States Department of Justice which represents federal agencies, and the California Public
26 Utilities Commission.

27
28 ¹ Capitalized terms not otherwise defined shall have the same meaning as in the Motion.

OBJECTION

2. Under Ninth Circuit authority, “[i]t is well-established that the fruits of pretrial discovery are, in the absence of a court order to the contrary, presumptively public.” *San Jose Mercury News, Inc. v. U.S. Dist. Ct.*, 187 F.3d 1096, 1103 (9th Cir. 1999). The party seeking a protective order “bears the burden of showing specific prejudice or harm will result if no protective order is granted.” *Phillips v. G.M. Corp.*, 307 F.3d 1206, 1210-11 (9th Cir. 2002). The Debtors have failed to meet this burden. The Court should order that the Proposed Protective Order shall not apply to any person or entity that did not participate in its negotiation.

3. The Proposed Protective Order was negotiated solely among the Debtors, the TCC and the UCC. No other parties to the Debtors’ bankruptcy cases were included in the drafting of the Proposed Protective Order. Motion at 4:5-12. However, the Motion proposes to impose the requirements of the Proposed Protective Order on any person or entity and for all matters in these Chapter 11 Cases, regardless of whether such parties even have notice of the Motion, and without citing any legal authority to authorize such a sweepingly broad order.

4. Among other things, the Proposed Protective Order purports to limit the use of any Discovery Material to the Chapter 11 Cases. None of the example orders attached to the Motion applies broadly to every “person or entity” in a Chapter 11 case. Rather, each example order applies only to the parties who negotiated the particular order or to a limited group of parties involved in a specified, particular matter.

5. The Debtors’ utility operations are highly regulated by federal, state and local governmental entities. There are significant issues with restricting governmental units from using information received in discovery, including in these Chapter 11 Cases, for law enforcement or regulatory purposes. Further, the Proposed Protective Order appears to prohibit third parties from reporting information obtained in the Chapter 11 Cases that should be reported to law enforcement or regulatory authorities. The overly broad Proposed Protective Order infringes on the governmental entities’ police and regulatory authority in three main ways.

6. First, governmental units of the State of California have investigative, enforcement and regulatory powers that cannot be restricted by the Proposed Protective Order. These

1 governmental units must be able to use information obtained for their own purposes and proceed
2 with their usual authority without being restricted by the overly broad Proposed Protective Order.
3 See, e.g., Cal. Gov't Code §11180 (authorizing the head of each department of an agency of the
4 State of California to investigate and prosecute actions concerning all matters relating to the
5 business activities and subjects under the jurisdiction of the department including violations of
6 any law, rule or order of the department). A court may not enjoin an official from carrying out
7 his duties under the law. See Cal. Code Civ. Proc., § 526, subd. (b)(4), (6); Cal. Civ. Code §
8 3423(d), (f); *People v. Superior Court (Witzerman)* (1967) 248 Cal.App.2d 276, 282-84
9 (protective order that tied hands of the Attorney General was an abuse of discretion).²

10 7. Second, under California law, governmental units of the State of California must
11 be able to share information with law enforcement and to communicate among themselves for
12 regulatory and law enforcement purposes without any curtailment. For example, any
13 governmental unit of the State of California, including the California State Agencies, has the
14 authority to disclose information obtained through its investigations to law enforcement personnel
15 and agencies and to personnel of other government agencies for law enforcement or regulatory
16 purposes. See, e.g., Cal. Gov't. Code § 11181(g). Government Code section 11181(g) permits a
17 department head to divulge information related to unlawful activity that is discovered from
18 "interrogatory answers, papers, books, accounts, documents, and [other discoverable items] or
19 testimony" to the Attorney General or any prosecuting attorney in the State of California, other
20 state or the United States with responsibility for investigating the unlawful activity under certain
21 conditions. See also, Cal. Gov't. Code § 11180.5 (state agency may assist Attorney General in

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23 ² For example, the California Franchise Tax Board ("FTB") has statutory authority to conduct
24 investigations using demands for information and administrative subpoenas under California
25 Revenue and Taxation Code section 19504. To the extent that the Proposed Protective Order
26 seeks to limit the FTB's ability to utilize an administrative subpoena, such order would violate
27 Article XIII, Section 32, of the California Constitution which provides: "No legal or equitable
28 process shall issue in any court against this State or any officer thereof to prevent or enjoin the
collection of any tax. After payment of tax claimed to be illegal, an action may be maintained to
recover the tax paid, with interest, in such manner as may be provided by the Legislature." A
subpoena issued by FTB "is the first step in the collection of tax and an integral part of the tax
collection process, and section 32 mandates that it shall not be prevented or enjoined by the legal
or equitable process of any court." *People ex rel. Franchise Tax Board v. The Superior Court*,
164 Cal.App.3d 526, 545 (1985).

1 conducting investigations). California Government Code section 11181 sets forth the wide
2 variety of methods by which the Attorney General may carry out his authority to conduct an
3 investigation to ascertain whether any laws are being violated. Such activities cannot be
4 enjoined. See Cal. Code Civ. Proc., § 526, subd. (b)(4), (6); Cal. Civ. Code § 3423(d), (f); *People*
5 *v. Superior Court (Witzerman)* (1967) 248 Cal.App.2d 276, 282-84 (protective order that tied
6 hands of the Attorney General was an abuse of discretion).

7 8. Third, the California State Agencies are concerned that the Proposed Protective
8 Order appears to prohibit third parties from providing information to law enforcement or
9 regulatory authorities regarding potential violations of the law.

10 9. Rather than having governmental units swept up in the overly broad Proposed
11 Protective Order being requested by the Debtors and the TCC, and negotiated solely by the
12 Debtor, the UCC and the TCC apparently without any consideration of law enforcement and
13 regulatory exceptions, governmental units should be carved out from the Proposed Protective
14 Order. These issues can and should be dealt with on a case-by-case basis with governmental units
15 as they arise in the Chapter 11 Cases.

16 10. The California State Agencies are informed and believe that other governmental
17 authorities involved in the Chapter 11 Cases, including the United States Department of Justice,
18 which represents federal agencies in the Chapter 11 Cases, concur with the position of the
19 California State Agencies that the Proposed Protective Order should apply solely to the parties
20 who negotiated it.

21 11. The California State Agencies reserve the right to present other objections to the
22 form of protective order in the event the Court denies their request to be excluded therefrom. As
23 admitted by the Debtors and the TCC, no one other than the Debtors, the TCC and the UCC have
24 been privy to the negotiations.

25 12. The California State Agencies have presented these issues to counsel for the
26 Debtors and will continue to attempt to resolve them prior to the hearing on the Motion.

27 **RESERVATION OF RIGHTS**

28 13. Neither this objection nor any subsequent appearance, pleading, proof of claim,

1 claim or suit is intended or shall be deemed or construed as:

2 a. a consent by the California State Agencies to the jurisdiction of this Court
3 or any other court with respect to proceedings, if any, commenced in any case against or
4 otherwise involving the California State Agencies;

5 b. a waiver of any right of the California State Agencies to (i) have an
6 Article III judge adjudicate in the first instance any case, proceeding, matter or controversy as to
7 which a Bankruptcy Judge may not enter a final order or judgment consistent with Article III of
8 the United States Constitution, (ii) have final orders in non-core matters entered only after de
9 novo review by a District Court Judge, (iii) trial by jury in any proceeding so triable in the
10 Chapter 11 Cases or in any case, controversy, or proceeding related to the Chapter 11 Cases,
11 (iv) have the United States District Court withdraw the reference in any matter subject to
12 mandatory or discretionary withdrawal, or (v) any and all rights, claims, actions, defenses, setoffs,
13 recoupments or remedies to which the California State Agencies are or may be entitled under
14 agreements, in law or in equity, all of which rights, claims, actions, defenses, setoffs and
15 recoupments are expressly reserved hereby; or

16 c. a waiver of any objections or defenses that the State of California, the
17 California State Agencies or any other agency, unit or entity of the State of California may have
18 to this Court's jurisdiction over the State of California, the California State Agencies or such
19 other agency, unit or entity based upon the Eleventh Amendment to the United States
20 Constitution or related principles of sovereign immunity or otherwise, all of which objections and
21 defenses are hereby reserved.

22 CONCLUSION

23 The California State Agencies request that Court order that the Proposed Protective Order
24 apply only to the Debtors, the UCC and the TCC. Alternatively, at a minimum, the California

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1 State Agencies request that the Court include in any Proposed Protective Order an express
2 exception that such order does not apply to governmental units.

3 Dated: June 19, 2019

Respectfully submitted,

4 XAVIER BECERRA
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Supervising Deputy Attorney General
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7 By: /s/ Paul J. Pascuzzi

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10 Substances Control, California Department of Water
Resources, State Water Resources Control Board,
11 Regional Water Quality Control Boards, State Energy
Resources Conservation and Development Commission,
12 California Department of Forestry and Fire Protection,
California Department of Fish and Wildlife, California
13 Air Resources Board, California Franchise Tax Board,
California Coastal Commission, Department of Parks
14 and Recreation, San Francisco Bay Conservation and
Development Commission, Department of Housing and
15 Community Development, Central Valley Flood
Protection Board, Department of Conservation including
16 the Division of Oil, Gas, and Geothermal Resources,
State Coastal Conservancy, California High Speed Rail
17 Authority, California Natural Resources Agency, and
California State Lands Commission
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I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is 400 Capitol Mall, Suite 1750, Sacramento, CA 95814. On June 19, 2019, I served the within documents:

By Electronic Service only via CM/ECF.

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